

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BUNGIE, INC.,

Plaintiff,

v.

AIMJUNKIES.COM; PHOENIX  
DIGITAL GROUP, LLC; DAVID  
SCHAEFER; JORDAN GREEN;  
JEFFREY CONWAY; and JAMES  
MAY,

Defendants.

No. 2:21-cv-00811

PLAINTIFF BUNGIE, INC.'S  
PROPOSED JURY INSTRUCTION NO. 9  
REGARDING SPOILIATION

Plaintiff Bungie, Inc. ("Bungie" or "Plaintiff") provides the following proposed jury instruction for Instruction No. 9, Spoliation of Evidence.

## INSTRUCTION NO. 9

Spoliation of Evidence

Spoliation is the destruction or significant alteration of evidence, or failure to preserve evidence, in pending or reasonably foreseeable litigation. Spoliation of evidence raises a presumption that the destroyed evidence goes to the merits of the case, and further, that such evidence was adverse to the party that destroyed it.<sup>[1]</sup>

Phoenix Digital, Mr. Schaefer, Mr. Conway, and Mr. Green (the “Phoenix Digital Defendants”) deleted: (1) records of the Cheat Software, including access to the Cheat Software, from the AimJunkies.com website, (2) records relating to forum messages regarding the Cheat Software, (3) records relating to sales of the Cheat Software, including financial records relating to the sales records and records from various payment processors and for Bitcoin transactions and records of Bitcoin transactions with the individual referred to as Andreas Banek, (4) the Loader Software and any documents relating to the Loader Software, and (5) images allegedly from *Destiny 2* used in the marketing of the Cheat Software. The Phoenix Digital Defendants also failed to preserve any archival information or records from AimJunkies.com prior to the website’s alleged sale.<sup>[2]</sup>

The Phoenix Digital Defendants had a duty to preserve this evidence.<sup>[3]</sup>

The Phoenix Digital Defendants intentionally took steps to delete or otherwise render inaccessible this relevant evidence after their duty to preserve evidence triggered<sup>[4]</sup> and did so with an intent to deceive Bungie or otherwise interfere with Bungie’s ability to proceed to trial.<sup>[5]</sup>

Defendant James May wiped four hard drives that he alleges Bungie improperly accessed in relation to this suit.<sup>[6]</sup>

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<sup>1</sup> Dkt. No. 216 (Order Granting Bungie’s Motion for Discovery Sanctions) at 5.

<sup>2</sup> *Id.* at 3–4.

<sup>3</sup> *Id.* at 9–11.

<sup>4</sup> *Id.* at 17.

<sup>5</sup> *Id.* at 18.

<sup>6</sup> *Id.* at 4.

1 Mr. May had a duty to preserve this evidence.<sup>[7]</sup>

2 Mr. May intended to deprive Bungie of the evidence that he destroyed.<sup>[8]</sup>

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4 You may presume that the records and information deleted, destroyed, or otherwise  
5 rendered inaccessible by Defendants' intentional actions after their duty to preserve evidence arose  
6 were unfavorable to Defendants.<sup>[9]</sup>

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9 **Authority:** Dkt. No. 216 (November 1, 2023 Order Granting Deferred Portion of Bungie's  
10 Motion for Discovery Sanctions); *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001  
11 (9th Cir. 2002); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006); *Dong Ah Tire &*  
12 *Rubber Co. v. Glasforms, Inc.*, No. C06-3359, 2009 WL 1949124, at \*10 (N.D. Cal. July 2,  
13 2009) (citing *Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir.  
14 1982)).

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<sup>7</sup> *Id.* at 11–12.

<sup>8</sup> *Id.* at 18.

<sup>9</sup> *Id.* at 19.

DATED: April 29, 2024

By: /s/ William C. Rava

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